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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH BRIGGS, Defendant and Appellant.	D074446 (Super. Ct. No. SCE363850)

APPEAL from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Affirmed.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Christine Y. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

An information charged defendant Joseph Briggs with two counts of making a criminal threat (Pen. Code,[1] § 422), one against Tim K. (count 1) and the other against Chris M. (count 2), and five counts of harassment by telephone or electronic contact (§ 653m, subdivision (a); counts 3-7). A jury found Briggs not guilty on count 1, but guilty on count 2 and all other counts. Briggs was sentenced to three years formal probation with the condition that he serve 270 days in jail.

Briggs appeals, contending the trial court had a sua sponte duty to instruct on the lesser included offense of attempted criminal threat. Briggs does not contest threatening the victim. Instead, he argues there is evidence from which the jury could have reasonably inferred that the victim was not in sustained fear, a required element of criminal threat. We find the record does not support an instruction on the lesser included offense and affirm the judgement.

FACTUAL AND PROCEDURAL BACKGROUND

In 2016, Tim K. and Adele N. socialized with Anastasia S., Adele's childhood friend, and Briggs, Anastasia's boyfriend. In mid-2016, Anastasia and Briggs separated. After the separation, Tim and Adele no longer socialized with Briggs.

Prior to Anastasia and Briggs's breakup, Adele borrowed $1,300 from Anastasia. The loan was from Anastasia, not Briggs. However, in early August 2016, Briggs called

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1 All further statutory references are to the Penal Code.

Tim and demanded repayment of the money to him. Tim explained that the matter was between Adele and Anastasia and that payments had already been made to Anastasia.

Briggs insisted that he was owed the money and declared that he was going to get the money one way or another. Briggs contacted Tim several more times, becoming increasingly aggressive over the course of each call.

Around this time, Tim and Adele lived with Chris M. Chris testified that Tim and Adele were stressed as a result of Tim's conversations with Briggs. Chris offered to talk to Briggs and to see if he could end the harassment.

Chris contacted Briggs, told him that the repeated phone calls were harassing, and he explained the proper way to resolve the matter was through the courts. Briggs was immediately hostile and told Chris stay out of business that did not concern him. The two men exchanged a number of phone calls and taunts. At first, the conversations pertained to the financial dispute. But after a while, the contact escalated into taunts to fight Chris and vulgar comments about wanting to have sex with Chris's daughter, who was two years old at the time. Over the course of four days, Briggs barraged Chris with hundreds of phone calls and texts at all times of the day and night.

Chris called the sheriff's department on August 3 to report the harassing contact. Chris would not reveal his last name because he believed that Briggs was trying to find him, and he did not want his information on a police report. When asked by police dispatch if Briggs was threatening harm, Chris said that Briggs was not threatening him but was using extreme, vulgar language and was calling repeatedly. The call to the police was initiated due to voicemails and text messages Briggs sent Chris that said, among

other things, "Can I give your daughter some dick?" and "Big dick for little butthole." At this point in time, Chris did not feel threatened.

Briggs became more aggressive, leaving voicemail messages in which he talked about wanting to beat up Chris and have sex with his wife, kids, and mother, saying, "Tell me where the fuck to meet you, so I can just fucking beat you into the fucking ground for harassing me."

On August 4, Briggs stated in a phone conversation that he wanted to meet up right then and put a bullet in Chris's head and also threatened to rape and murder his daughter and throw her in a dumpster. Shortly after receiving this phone call, Chris called the sheriff's department again, explaining, "My life is being threatened. My daughter's life is being threatened, and my family's life is being threatened." Chris said, "I had him on the phone, uh, just about, uh, 10 minutes ago, but he wants to meet up with me. He's trying to find out where I live because he wants to put a bullet in my head." Chris testified that at this point he was in fear, especially for his daughter.

On August 5, Chris called the sheriff's department again. This time, Chris said that Briggs had learned his last name. Chris stated that Briggs's contact started as "idle threats" but were more threatening now. Briggs told Chris that he was going to run his name through some kind of system to find him and his family. Chris asked the dispatcher whether the fact that Briggs had his name and the ability to find him changed whether the sheriff's department could do anything about the situation. Chris reiterated that Briggs wanted to know Chris's location so he could put a bullet in his head.

On August 6, Chris contacted the sheriff's department a fourth time and filed a formal report. The fact that Briggs knew his last name made Chris even more fearful because he believed Briggs was actively searching for him. On or about August 6, Briggs's calls slowed down or stopped. Still, Chris testified that he was in fear from the time that Briggs threatened him and his daughter and remained afraid even after the contact stopped.[2]

Between August 5 and 7, Anastasia and Briggs were staying together in a hotel in Northern California. During this time with Briggs, Anastasia witnessed one of the threatening phone calls. Anastasia called Chris to warn him about the threats and how she believed Briggs's threats were serious. Anastasia testified that Briggs told her that he wanted to kidnap, rape, and kill Chris's daughter. Briggs had previously told her that he usually had no intention of acting on verbal threats, but this time he said he could actually commit the acts because he was so upset. Anastasia stated she was concerned about the safety of Chris and his child and warned Chris that Briggs might follow through with his threats. Further, Briggs told Chris that he was a "cop killer" and talked about adding Chris to his count of 400 dead bodies. Chris testified that throughout the duration of the threats—and even after—he was in fear for himself and his family.

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[2] During a phone call to the sheriff's department on August 3, 2016, Chris stated the contact by Briggs was not threatening. However, this changed after the August 4, 2016 contact by Briggs where he threatened to rape and murder Chris's daughter.

The jury found Briggs not guilty on count 1, guilty on count 2, and guilty on counts 3-7. Briggs was sentenced to three years of formal probation with the condition that he serve 270 days in jail.

Briggs timely filed a notice of appeal.

DISCUSSION

Briggs's sole contention on appeal is that the trial court prejudicially erred when it failed to instruct the jury sua sponte on the lesser included offense of attempted criminal threat. Briggs does not contest he threatened Chris between August 3 and 6, 2016. He asserts, however, that there was substantial evidence from which a reasonable jury could question Chris's degree of fear and whether the element of "sustained fear" was met. Therefore, Briggs claims, the court's error was prejudicial and requires reversal.

I.

LEGAL PRINCIPLES

A. *The Trial Court's Sua Sponte Duty to Instruct on Lesser included Offenses*

" 'The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' [Citations.] 'That obligation encompasses instructions on lesser included offenses.' " (*People v. Souza* (2012) 54 Cal.4th 90, 115-116 (*Souza*).) "Such instructions are required only when there is substantial evidence that, if the defendant is guilty at all, he is guilty of the lesser offense, but not the greater. [Citations.] ' " ' "Substantial evidence" in this context is " 'evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]' " that the lesser offense, but not the greater, was

committed.' " [Citation.]' " (*People v. Wyatt* (2012) 55 Cal.4th 694, 704.) "In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight." (*People v. Breverman* (1998) 19 Cal.4th 142, 177 (*Breverman*).) The court should not evaluate witness credibility, a task for the jury. (*Id.* at p. 162.)

On appeal, we review independently whether the trial court improperly failed to instruct on a lesser included offense, considering the evidence in the light most favorable to the defendant. (*Souza, supra*, 54 Cal 4th at p. 113; *People v. Brothers* (2015) 236 Cal.App.4th 24, 30.)

B. *Elements of Criminal Threat and Attempted Criminal Threat*

"In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat . . . was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]'

under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228 (*Toledo*); see also § 422.)

Sustained fear, the fourth element of a criminal threat, "requires proof of a mental element in the victim" (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 (*Allen*)) and "has a subjective and an objective component" (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1140 (*Ricky T.*)). "A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances." (*Ibid.*) " 'Sustained fear' refers to a state of mind," and "describes the emotion the victim experiences." (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349 (*Fierro*).) Within the meaning of section 422, "sustained" means "a period of time that extends beyond what is momentary, fleeting, or transitory." (*Allen*, at p. 1156.) However, no set time frame exists for a victim to be in a statutorily-sufficient state of "sustained fear." (*Id.* at p. 1156, fn. 6.) Case law has characterized a victim's fear as sufficiently sustained within the meaning of section 422 when the fear lasts anywhere between one and 15 minutes. (See *Fierro*, at p. 1349 [one minute sufficient to qualify as sustained fear when a defendant threatens to kill a victim with a visible weapon]; *Allen*, at p. 1156 [15 minutes sufficient to qualify as sustained fear].)

In addition, a "victim's knowledge of defendant's prior conduct is relevant in establishing that the victim was in a state of sustained fear." (*Allen*, *supra*, 33 Cal.App.4th at p. 1156; see, e.g., *Ricky T.*, *supra*, 87 Cal.App.4th 1132 [a victim's lack of history with defendant paired with victim's one day delay in calling police evidenced a

fear that was merely fleeting].) Calls to the police are evidence that a victim is in fear of the defendant. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1538 (*Melhado*).)

An attempted criminal threat is a lesser included crime of a criminal threat. (*People v. Chandler* (2014) 60 Cal.4th 508, 514; *Toledo, supra,* 26 Cal.4th at p. 226.) " '[I]f a defendant, . . . acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat.' " (*Chandler*, at p. 515.)

For example, in *Toledo*, a husband told his wife, "I am going to kill you" tonight, and although the victim initially told an investigator that she was scared, the victim later testified that she was not actually frightened. (*Toledo, supra,* 26 Cal.4th at p. 235.) Because the victim's contradictory testimony supplied substantial evidence for a jury to question the subjective state of the victim's fear, a jury could find the defendant committed only the lesser offense of attempted criminal threat. (*Ibid.*)

II.

THE EVIDENCE DOES NOT SUPPORT AN ATTEMPTED CRIMINAL THREAT INSTRUCTION

Briggs asserts that the lesser included offense instruction should have been given because the jury could have found a reasonable doubt as to whether Chris was in sustained fear as a result of the threats. Briggs points to testimony by Chris wherein he

stated that Briggs was making "idle threats" and did not take them seriously. Although Chris did not initially take Briggs's threats seriously, as they escalated and Briggs became more aggressive, Chris became more concerned and fearful. Sustained fear does not require the victim to be in fear over the entire duration of contact; it must be more than "momentary, fleeting, or transitory." (*Allen*, *supra*, 33 Cal.App.4th at p. 1156.) Here, Chris testified to being afraid once the threats escalated to include putting a bullet in his head, and threats of raping and murdering his daughter. This fear continued for several days due the uncertainty of whether Briggs knew Chris's location and what might happen if Briggs found Chris or his family.

Briggs also argues that because Chris did not file a police report until August 6, there was substantial evidence that he did not experience sustained fear. We are not persuaded. There is no requirement that the victim feel fearful from the first communication. (See *Fierro, supra,* 180 Cal.App.4th at pp. 1345-1346 [victim was not in fear until defendant displayed a weapon during verbal altercation].) Nor is there a requirement that the victim file a police report to demonstrate fear. (See *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1162 [victim not immediately calling the police did not change that the totality of the circumstance provided substantial evidence of a threat].) However, calls to the police are evidence that a victim is in fear of the defendant. (*Melhado*, *supra*, 60 Cal.App.4th at p. 1538.) Chris called the police four times between August 3 and August 6 and made a formal police report on August 6. Chris did not make a police report earlier due to fear of his last name and personal information getting to Briggs, which would allow Briggs to locate Chris and his family and follow through on

his threats. Once Chris believed that Briggs discovered his last name, he filed a formal police report due to the fear that Briggs would find his location. During and after the threat made on August 4, Chris testified that he was in fear. He expressed this fear when he called the police immediately after the threatening phone call by Briggs. Even though he did not file a formal police report at this time, he expressed to the police dispatch fear for himself and his family.

"A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances." (*Ricky T., supra,* 87 Cal.App.4th at p. 1140.) Anastasia's testimony provides evidence that the sustained fear expressed by Chris was reasonable. Anastasia testified that she witnessed Briggs threaten to kidnap, rape, and kill Chris's daughter; she further stated that he was so upset he could actually commit the offense. Anastasia also testified that she thought Briggs was serious about carrying out the threats because he was kind of joyful when he made the threat and had a tendency of fantasizing torture on others. Anastasia was worried enough about the safety of Chris and his family that she contacted Chris to warn him to take the threats seriously. Anastasia's warning was evidence that Chris's fear was objectively reasonable. Thus, her warning, combined with Briggs's direct threats to Chris that he was going to put a bullet in his head and rape and murder his daughter, in totality provides substantial evidence that supports the conclusion that Chris was in sustained fear for himself and his family.

We have examined the evidence and found it insufficient to support a reasonable inference that Chris was not in sustained fear. Therefore, the court did not err by failing

to give a sua sponte instruction on the lesser included offense of attempted criminal threat.

III.

HARMLESS ERROR

Even assuming the court erred in not instructing on the lesser included offense, the error was not prejudicial. "[E]vidence sufficient to warrant an instruction on a lesser included offense does not necessarily amount to evidence sufficient to create a reasonable probability of a different outcome had the instruction been given." (*People v. Banks* (2014) 59 Cal.4th 1113, 1161, disapproved on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

Error in failing sua sponte to instruct on lesser included offenses which are supported by the evidence must be reviewed for prejudice exclusively under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*Breverman, supra,* 19 Cal.4th at p. 178.) " '[U]nder *Watson,* a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error.' [Citation.]" (*People v. Beltran* (2013) 56 Cal.4th 935, 955.) "Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Breverman, supra,* 19 Cal.4th at p. 177.) " ' "The Supreme Court has emphasized 'that a

"probability" in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' " ' " (*People v. Brown* (2016) 245 Cal.App.4th 140, 155.)

Even if there were an evidentiary basis for the lesser instruction, the instructional error was harmless because it is not reasonably probable that, had the court instructed the jury on attempted criminal threat, the result would have been different. (*Breverman*, *supra*, 19 Cal.4th at pp. 176-177; *Watson*, *supra*, 46 Cal.2d at p. 836.) The fact that Chris called the police four times, filed a police report, and testified that he was in sustained fear when threatened with a bullet to the head, and the prospect of his daughter being raped and murdered overwhelmingly showed that Chris was in a state of sustained fright and was convinced that Briggs was serious and capable of carrying out his threats. The evidence also showed that Chris was in actual fear once Briggs made the threat against Chris and his family. We conclude that because the evidence supporting the existing judgment is so relatively strong it is not reasonably probable the exclusion of the lesser included offense affected the result.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

AARON, J.

DATO, J.